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No. 01-456

IN THE

Supreme Court of the United States

HOLLAND AMERICA LINE-WESTOURS, INC.,
Petitioner,

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari is warranted to review a decision of the court of appeals enjoining an ongoing violation of the National Environmental Protection Act, when the court employed the traditional balancing test endorsed by this Court in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), fully weighed the parties' interests and evidence for and against an injunction, and concluded that injunctive relief was appropriate.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondent National Parks Conservation Association (formerly National Parks and Conservation Association), a nonprofit citizens' organization dedicated to protecting, preserving, and enhancing the National Park System, was the plaintiff-appellant below.

Petitioner Holland America Line-Westours intervened below in support of defendants Department of the Interior and the Director of the National Park Service.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	2
REASONS FOR DENYING THE WRIT	10
I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT	11
II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL	13
III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF NATIONAL IMPORTANCE	14
IV. THE DECISION BELOW WAS CORRECT	16
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531 (1987) ..... *passim*

Blue Mountains Biodiversity Project v. *Blackwood*, 161 F.3d 1208 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) 3

Citizen Advocates for Responsible Expansion v. *Dole*, 770 F.2d 423 (5th Cir. 1985) 16-17

City of Davis v. *Coleman*, 521 F.2d 661 (9th Cir. 1975) 16

Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 2

Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 3, 14

Massachusetts v. *Watt*, 716 F.2d 946 (1st Cir. 1983) 13

National Audubon Soc'y v. *Hoffman*, 132 F.3d 7 (2d Cir. 1997) 3

North Carolina v. *FAA*, 957 F.2d 1125 (4th Cir. 1992) 3

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 2, 3

Sierra Club v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988), *overruled on other grounds*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 14, 16

Sierra Club v. *Marsh*, 872 F.2d 497 (1st Cir. 1989) 13

Sierra Club v. *United States Army Corps of Eng'rs*, 772 F.2d 1043 (2d Cir. 1985) 3

Town of Huntington v. *Marsh*, 884 F.2d 648 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 14

TABLE OF AUTHORITIES—Continued

Page

US Ecology, Inc. v. *United States Dep't of Interior*, 231 F.3d 20 (D.C. Cir. 2000) 2

Weinberger v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981) 2

Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 11

CONSTITUTIONAL AND STATUTORY PROVISIONS:

National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* 2

42 U.S.C. § 4321 2

42 U.S.C. § 4332 2

42 U.S.C. § 4332(2)(C) 2, 3

Pub. L. No. 107-63, 115 Stat. 414 10

RULE:

S. Ct. R. 10 1

REGULATIONS:

40 C.F.R. § 1508.3 2

40 C.F.R. § 1508.9 2

40 C.F.R. § 1508.14 2

40 C.F.R. § 1508.27(b)(4) 8

61 Fed. Reg. 11,428 (Mar. 20, 1996) 5

61 Fed. Reg. 27,008 (May 30, 1996), *codified at* 36 C.F.R. § 13.65(b) 6

OTHER AUTHORITIES:

John Muir, *Travels In Alaska*, ch. XI 4

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BRIEF IN OPPOSITION

Respondent National Parks Conservation Association (NPCA) hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. The decision below does not conflict with a case decided by this Court, or by any of the Courts of Appeals. It does not present any unsettled issue of federal law. What it does present is a commonplace, fact-bound application of this Court's decision in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), to the particular

facts of this National Environmental Protection Act (NEPA) case.

COUNTERSTATEMENT

Statutory Background. The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, established a national policy to "prevent or eliminate damage to the environment and biosphere." 42 U.S.C. § 4321. To fulfill its "broad national commitment to protecting and promoting environmental quality," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), NEPA directs federal agencies, "to the fullest extent possible," to prepare a detailed Environmental Impact Statement (EIS) before commencing any "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332, § 4332(2)(C).[1] An EIS must set forth, among other things, the "environmental impact of the proposed action;" "any adverse environmental effects which cannot be avoided should the proposal be implemented;" and possible "alternatives to the proposed action." *Id.* § 4332(2)(C)(i)-(iii); *see also Kleppe* v. *Sierra Club*, 427 U.S. 390, 399-400 (1976).

Not every federal action requires an Environmental Impact Statement; if an action will *not* "significantly affect[ ]" the environment, no EIS is necessary. Agencies considering whether to prepare an EIS often prepare "Environmental Assessments," or EAs, to determine whether the impact of a proposed action warrants preparation of a full EIS. *See* 40 C.F.R. § 1508.9; *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 n.1 (1981). An Environmental Assessment is a "less formal" document than an EIS, *US Ecology, Inc.* v. *United States Dep't of Interior*, 231 F.3d 20, 22 (D.C. Cir. 2000), designed to "provide[] sufficient evidence and analysis for determining whether to

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[1] "Affecting means will *or may* have an effect on." 40 C.F.R. § 1508.3 (emphasis added). The "human environment" is interpreted "comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14.

prepare an EIS or a finding of no significant impact." *Blue Mountains Biodiversity Project* v. *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999). When an agency prepares an Environmental Assessment and it appears that the "determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared." *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997) (citing cases). If, on the other hand, an agency "decides that no environmental impact statement is required because the proposed action will not have a significant impact," *North Carolina* v. *FAA*, 957 F.2d 1125, 1128 (4th Cir. 1992), the agency reports its decision in a "finding of no significant impact," or FONSI. 40 C.F.R. § 1508.9; *see* 42 U.S.C. § 4332(2)(C).

NEPA's procedures are designed to fulfill NEPA's animating purpose—to "ensure[ ] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). By requiring an agency to assess the degree of harm to the environment before it embarks on a course of action that could adversely affect the environment, NEPA ensures that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson*, 490 U.S. at 349. NEPA's "look-before-you-leap" provisions also are designed to inform the general public, "guarantee[ing] that the relevant information will be made available to the larger audience." *Id.* The Act thus "insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug." *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985).

The Park and the Bay. Glacier Bay National Park and Preserve (the "Park") spans over three million acres of Alaska's coast, stretching northward from Alaska's inside passage to the Alsek River and encircling the massive saltwater bay that gives the Park its name. Glacier Bay

encompasses a fjord system extending more than sixty miles inland; four of its fjords contain actively calving glaciers. Pet. App. 3a. The Park has long been recognized as one of our Nation's most unique treasures, from the early voyages of the explorer George Vancouver in 1794, to 1879, when naturalist John Muir first traveled to Glacier Bay, through today.[2] The largest protected marine ecosystem in the National Park system, the Park is host to a vast assemblage of "wildlife species of inestimable value." Pet. App. 1a. Over two hundred species of fish, including the harbor porpoise and the Minke whale, swim in its waters; dozens of species of seabirds nest within Glacier Bay and along its outer coast; and harbor seals and sea otters colonize the Bay. The Steller sea lion, listed as an endangered species under the Endangered Species Act, *id.* 3a n.1, feeds extensively in the Bay. Among the Bay's most unique species is the humpback whale, one of the most endangered baleen whale populations in the world. The humpback was placed on the endangered species list in 1973, but population recovery has been slow; the entire North Pacific population of humpback whales is estimated to hover between 1,500 and 2,100. *Id.* 3a; Ct. App. E.R. 85.

The Vessel Management Plan. The Park's geographic contours are such that Glacier Bay provides the primary means of access to the rest of the Park. Pet. App. 4a. An array of vessels, from massive cruise ships to small privately-owned boats, access the Bay, particularly during the summer season. In the late 1970s, in response to a decline in the local humpback whale population, the Park Service began regulating vessel entries into the Park by placing quotas on the number of cruise ships, tour boats, charter vessels, and private boats entering the Bay. *Id.* 5a.

The Park Service publishes its vessel quotas in "Vessel Management Plans." The Vessel Management Plan prior to the one at issue here, promulgated in 1984, provided for a

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[2] *See* John Muir, *Travels In Alaska*, ch. XI ("The Discovery of Glacier Bay") ("The view down the bay among the islands was, I thought, the finest of this kind of scenery that I had yet observed").

twenty-percent increase in vessel traffic to be implemented over four years, from 1984 to 1988. Between 1988 and 1994, the number of vessels entering the Park held steady. Because of larger cruise ships, however, the number of passengers visiting the park increased substantially, rising 144 percent from 1980 to 1994.

In the early 1990s, the tourism industry began lobbying for an increase in cruise ship entry quotas in Glacier Bay. Ct. App. E.R. 31. In May 1995, the Park Service sought public comment on a new Vessel Management Plan containing several proposed alternatives to the then-existing Park vessel restrictions. The alternatives ranged from a "no-action" approach, *e.g.*, maintaining vessel quotas at current levels, to decreasing vessel entries, to increasing seasonal cruise ship entries by 72 percent. The Park Service identified the last alternative—the 72 percent increase—as the one it preferred. Pet. App. 8a.

The Park Service received hundreds of written comments on its proposal. Approximately 85 percent of the comments opposed it, and the vast majority of commenters favored the proposal reducing the number of vessel entries to the Park. *Id.* NPCA participated in the administrative proceedings. *Id.*

In March 1996, the Park Service announced that it had selected a modified version of its 72-percent-increase proposal as the new Vessel Management Plan. 61 Fed. Reg. 11,428 (Mar. 20, 1996). Under the new Plan, the summer seasonal cruise ship quota was immediately increased by 30 percent over 1995 levels for 1996 and 1997, and could increase 72 percent above 1995 levels thereafter, contingent upon specified circumstances. With its announcement, the Park Service issued a "Finding of No Significant Impact," or FONSI, announcing its conclusion that the new Vessel Management Plan did not "constitute a major federal action significantly affecting the quality of the human environment." Ct. App. E.R. 249.

Notwithstanding the Park Service's definitive finding of "no significant impact," the Environmental Assessment

accompanying the FONSI showed that the impact of the Plan on Park resources was in fact *unknown*. The Park Service acknowledged, among other things, that the number of collisions between whales and vessels could increase; however "the degree of increase is unknown," and that "[t]he degree to which disturbance and displacement would affect the humpback whale populations in Glacier Bay is unknown." Pet. App. 9a. The Park Service had much the same to say about the Plan's potential impacts on other wildlife in the harbor, including the endangered Steller sea lion. Among other things, the Park Service conceded that that "[l]ittle is known about the effects of the disturbance" on the sea lion, id. 8a; that the "effect of increased levels of disturbance" on cetacean populations was "unknown," *id.* 9a; that "little is known about the effects of the disturbance" on the harbor seal; that it was "unknown whether populations of marbled murrelets and Kittilitz murrelets would change" with an increase in vessel traffic; that the "overall effect on bald eagle populations is unknown;" that "[i]t is unknown if waterfowl populations would change under this alternative;" and that "[t]he biological effects of * * * air pollutants from stack emissions are unknown." *Id.* 9a-10a (emphases added).

Despite all these *unknown* impacts—and many more not enumerated here—the Park Service issued a "finding of *no significant* impact." *Id.* 10a.

Following the FONSI, the NPCA submitted further comments to the Park Service, pointing out that a finding of *no* significant impact based on *unknown* effects frustrates NEPA's animating purpose of ensuring that the agency take a "hard look" at the environmental consequences of a proposed action before action is taken. *See id.*; *id.* 12a. But in May 1996, the Park Service adopted, with minor changes, its new Vessel Management Plan for Glacier Bay. 61 Fed. Reg. 27,008 (May 30, 1996), *codified at* 36 C.F.R. § 13.65(b).

Proceedings Below. Following the Park Service's "finding of no significant impact" and adoption of the Vessel Management Plan, the NPCA filed suit against the Director of the National Park Service and the Secretary of the Inte-

rior—the official responsible for the activities of the Department of Interior in managing the National Park Service. Pet. App. 10a-11a. NPCA alleged in its complaint that defendants had violated the Administrative Procedure Act (APA) and NEPA by issuing a finding of no significant impact, and thus refusing to prepare an Environmental Impact Statement, when the impacts of the Park Service's proposed action on Glacier Bay were concededly not known. NPCA's request for relief sought an injunction against the 1996 Vessel Management Plan—thus returning vessel entries to the pre-1996 levels—until a full EIS was prepared. *Id.* 11a. Westours, a cruise ship operator, intervened as a defendant in the proceedings. *Id.*

The parties filed motions for summary judgment. Although the district court acknowledged that " 'the effects cruise ship operations have on Glacier Bay National Park and the animals that live there are unknown,' " and that the EA " 'contains a long list of uncertainties about the potential effects of increased vessel traffic,' " it nonetheless concluded that the Park Service was not required to prepare an EIS. *Id.* (quoting district court opinion).

NPCA appealed.[3] The Ninth Circuit reversed. The court of appeals unanimously held that the Park Service had violated NEPA when it failed to prepare an EIS in the face of its repeated conclusions that the effects of a vessel increase on Glacier Bay were largely unknown. Pet. App. 15a-23a. Noting that the Park Service had proposed a "park research and monitoring program" to study the effects of vessel traffic

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[3] Petitioner states that in responding to NPCA's appeal, it asked the court to remand the issue of injunctive relief to the district court for a hearing, and that NPCA "*likewise* asked the court of appeals to remand the question of injunctive relief to the district court." Pet. 9 (emphasis added). Its characterization of NPCA's request for relief is quite misleading. In its opening brief and again on reply, NPCA asked the court of appeals to "reverse the District Court and remand the case with instructions to enjoin further implementation of the 1996 Vessel Management Plan until a full Environmental Impact Statement is prepared." NPCA Br. at 57; NPCA Reply at 30. That is what the Ninth Circuit did.

on the Park's wildlife and air and water quality, the court of appeals observed that "[t]hat is precisely the information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be prepared in this case." *Id.* 17a (emphasis in original). Nor, the court concluded, did the mitigating measures proposed by the Park Service relieve the Service from its obligations under NEPA; its "speculative and conclusory statements" about the efficacy of such measures were "insufficient to demonstrate that the * * * measures would render the environmental impact so minor as to not warrant an EIS." *Id.* 22a.[4]

The court of appeals next turned to NPCA's request for injunctive relief, applying the "traditional balance of harms analysis" long used to determine the appropriateness of an injunction. *Id.* 26a. At the outset of its discussion, the court of appeals quoted from this Court's decision in *Amoco Production Co.* v. *Gambell*, noting that " '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.' " *Id.* (quoting *Amoco*, 480 U.S. at 545). The court concluded that "NPCA has made the requisite showing for injunctive relief." Pet. App. 26a. As it held, an EIS was required to explore the environmental consequences of the Park Service's Vessel Management Plan. Where an EIS was required, the court concluded, "allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement." *Id.* 27a.

The court of appeals next examined the purported harm to the defendants from entry of an injunction. The government had asserted no such harm on appeal. Westours, for its part,

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[4] The court of appeals also held that the Vessel Management Plan was sufficiently controversial to warrant preparation of an EIS. *See* 40 C.F.R. § 1508.27(b)(4) (agency must consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" in determining whether to prepare an EIS). Pet. App. 23a-26a.

argued that the potential lost revenues it might suffer if the Plan was enjoined outweighed the potential damage to the environment from keeping the Plan in place. The court of appeals rejected that argument, concluding that the potential financial harm to Westours from a decrease in its allotted entries "fails to tilt the balance of harms in its favor."[5] *Id.* 28a. The Ninth Circuit also considered and rejected evidence Westours submitted on appeal purporting to show that the humpback whale population had remained stable over the short term, noting that the evidence "completely fail[ed] to address the other environmental effects at issue here." *Id.* at 28a-29a.

The court of appeals noted that in some "unusual circumstances," it might opt to withhold an injunction in a NEPA case or to limit its scope. *Id.* 27a n.18. Those circumstances were not present here, the court concluded; accordingly, having "fully weighed the competing interests using [its] traditional equitable jurisdiction," as this Court directed in *Amoco*, the Ninth Circuit concluded that "injunctive relief is appropriate." *Id.*

The Ninth Circuit also held that it was appropriate for it to decide the appropriate scope of relief at the appeal stage. There were no "intensely factual questions" that warranted sending the case back to the district court to determine the proper scope of the injunction; rather, "the scope of the injunction to which NPCA is entitled is quite plain." *Id.* 29a. The court of appeals accordingly directed the district court to enjoin the increases in vessel traffic under the 1996 Vessel Management Plan (while leaving in place its mitigating measures, as the government suggested), and to return vessel traffic "to its pre-1996 levels." *Id.* Recognizing that its procedures for rehearing could delay the return of the case

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[5] In addition, observing that NPCA first sought an injunction against the plan five years before the Ninth Circuit's decision, the Ninth Circuit stated that "neither Westours nor those of its passengers who may be unable to view Glacier Bay at the time they originally planned have cause to claim surprise as a result of any injunction." *Id.* 28a.

to the district court, the court of appeals left the exact timing of the injunction open on remand, "leav[ing] it to the district court to decide upon the effective date of the injunction * * * and specifically, to decide in its informed discretion * * * whether the injunction should take effect prior to the completion of this year's cruising season." *Id.* 30a.

The government and Westours sought rehearing and rehearing *en banc*. Their petitions were denied without dissent. *Id.* 34a.

On remand, after briefing and argument, the district court ruled from the bench that the Park Service and Westours had not advanced sufficient evidence of harm to their operations to warrant postponing the injunction until next cruise season. It ordered the injunction to issue effective immediately. Pet. App. 73a.[6]

Westours, the intervenor below, has now petitioned for certiorari. The Department of Interior and the Director of the National Park Service—the defendants below—have not.

REASONS FOR DENYING THE WRIT

Westours does not challenge the Ninth Circuit's determination that the Park Service violated NEPA when it failed to prepare an Environmental Impact Statement before approving a substantial increase in vessel traffic into Glacier Bay. Westours contends only that the court of appeals "significantly relax[ed] the standards in the Ninth Circuit for obtaining injunctive relief in environmental cases." Pet. 14. That is wrong. The decision of the court of appeals was a routine, fact-bound weighing of the evidence for and against an injunction in this NEPA case. The court of appeals's decision does not conflict with—indeed, it repeatedly quoted from—the relevant decisions of this Court. The decision

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[6] On November 5, 2001, a Department of Interior appropriations bill was enacted with a rider purporting to preserve vessel entries at 1996 levels until an EIS is completed. Pub. L. No. 107-63, § 130, 115 Stat. 414.

does not conflict with that of any other court of appeals. It presents no compelling issue of federal law. And it is also correct.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

This Court observed in *Amoco Production Co.* v. *Village of Gambell* that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." 480 U.S. at 545. The Court cautioned, however, that courts reviewing requests for injunctions in environmental cases must still engage in the traditional balance of harms test before ordering that an injunction issue. *Id.* at 544 (rejecting argument that irreparable harm is "presumed" when an agency fails to evaluate the environmental impact of its proposed action); *see Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982) (injunctive relief does not issue as a matter of course in environmental litigation, but, as in other litigation, issues after the court engages in a balancing of harms and concludes that an injunction is appropriate).

That is exactly what the Ninth Circuit did in this case. The court of appeals "fully weighed" the factors in favor of and against an injunction. Pet. App. 27a n.18. It concluded that environmental injury was likely, and it found that the balance of harms favored an injunction. *Id.* 27a-28a. [7] The court of appeals acknowledged—just as the Court implicitly did in

[7] Although Westours challenges the standards for granting injunctive relief that the court of appeals used, Pet. 16-25, and the procedures the court followed, *id.* 26-28, Westours is careful not to challenge the Ninth Circuit's underlying conclusion—that environmental harm was sufficiently likely to warrant an injunction. Westours' careful circumvention of that crucial issue is understandable; that wholly fact-bound conclusion is even less appropriate for certiorari treatment than the issues raised in the rest of its petition.

Amoco—that in some "unusual" cases, an injunction might not issue in response to potential environmental injury. *Id.* 27a n.18; *see Amoco*, 480 U.S. at 545 (noting that in cases where environmental injury is alleged and "sufficiently likely," "the balance of harms will *usually* favor the issuance of an injunction") (emphasis added). The Ninth Circuit concluded, however, that those unusual circumstances were not present in this case, and that an injunction was warranted. Pet. App. 27a n.18.[8]

From the court's elementary application of *Amoco* and the traditional equitable factors used in analyzing a motion for injunctive relief, Westours has cooked up an argument that the Ninth Circuit actually "significantly relax[ed]" its standards for injunctive relief. Pet. 14. According to Westours, the decision of the court of appeals adopted a "rule" that absent "unusual circumstances," courts "must enjoin governmentally authorized" (but illegal) activity "whenever a NEPA violation likely exists." *Id.* Westours further posits that the Ninth Circuit's decision did away with the "traditional balancing of equities" endorsed by this Court in *Amoco* and other rulings. *Id.*; *see also id.* at 21-22.

The Ninth Circuit did no such thing. The court in fact repeatedly stated that it was engaging in the "traditional balance of harms analysis" used in actions for injunctive relief. *See, e.g.*, Pet. App. 26a; *id.* 27a n.18. The Ninth Circuit also expressly followed this Court's lead in *Amoco*, in which this Court stated that the "usual[]" remedy for likely environmental injury was an injunction. 480 U.S. at 545. The court of appeals concluded that such injury was likely, in

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[8] Petitioner suggests that the Ninth Circuit's statement that an injunction will not issue in "unusual" circumstances, is equivalent to the rebuttable presumption found invalid in *Amoco*. That is not correct. It may well be unusual (as this Court implicitly noted in *Amoco*) for an injunction not to issue on a finding of a NEPA violation, but if the facts support such a ruling, the injunction can be denied. That is a far cry from a rebuttable presumption of an injunction in environmental cases, which—prior to *Amoco*—attached no matter what the individual facts.

light of the substantial increase in vessel traffic and the conceded impacts of that traffic on Glacier Bay's wildlife and air and water quality. *See* Pet. App. 26a-27a, 30a. It issued an injunction. That is the end of the story. The Ninth Circuit's decision in no way conflicts with *Amoco* or with *Romero-Barcelo*. Westours' portrayal of the Ninth Circuit's commonplace inquiry as a "[r]enegade" reshaping of the standards for injunctive relief, Pet. 20, is pure fiction.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

Westours next takes aim at the Ninth Circuit's purported "misread[ing]" of the First Circuit opinion in *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989). Writing for the court of appeals in that case, then-Judge Breyer observed that " 'when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.' NEPA in this sense differs from substantive environmental statutes." *Id.* at 500 (quoting *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). As the *Marsh* court recognized, "the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis * * * of the likely effects of their decision upon the environment." *Id.* (emphasis in original).

The Ninth Circuit in this case referred to *Marsh* in a footnote, noting that its reasoning "also justifies injunctive relief in this case," separate and apart from the Ninth Circuit's weighing of the factors for and against injunctive relief. Pet. App. 27a n.18. Westours seizes on the Ninth Circuit's alternative ruling. It devotes several pages of its petition to arguing that the court of appeals read *Marsh* to justify injunctive relief *whenever* a NEPA violation occurs, and suggests that its reading of *Marsh* has generated an "irreconcilable" circuit conflict. Pet. 22-25. The Ninth Circuit did

not misread *Marsh*; that court's reasoning supports exactly what the Ninth Circuit did in this case. The Ninth Circuit's reading of *Marsh* is also beside the point, because its footnoted reference was expressly made separate from its determination, employing the traditional balance of harms test, that injunctive relief was appropriate in this case. *See* Pet. App. 26a-29a (applying traditional balance of harms analysis); *id.* 27a & n.18 (noting, after concluding that "injunctive relief is appropriate," that *Marsh* "*also* justifies injunctive relief in this case") (emphasis added).

Nor does the Ninth Circuit's decision conflict with any other decision from any other court of appeals. Westours' petition singles out cases from the Second and (oddly) Ninth Circuits in which the courts declined to issue an injunction for putative violations of NEPA. *See* Pet. 23. The courts in those cases engaged in the same balancing of harms as the Ninth Circuit panel did here. They just reached different results based on the different facts and circumstances presented in those cases. Courts of appeal uniformly acknowledge what this Court recognized in *Amoco*: when environmental harm is sufficiently likely—and the Ninth Circuit so found here—injunctive relief is appropriate. *See, e.g.*, *Town of Huntington* v. *Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) (noting that "injunctive relief has been used when appropriate for violations of NEPA," and citing *Amoco*), *cert. denied*, 494 U.S. 1004 (1990); *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988) (affirming injunction for NEPA violation and citing *Amoco*), *overruled on other grounds by Marsh* v. *Oregon Natural Resources Council*, 490 U.S. at 377.

III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF NATIONAL IMPORTANCE

This case, in which the Ninth Circuit simply engaged in the traditional balancing of harms and found an injunction appropriate, plainly does not present a compelling and

unsettled issue of federal law warranting review. The federal government apparently agrees, having decided not to seek certiorari itself.

Westours itself implicitly recognizes the limits of its argument that this case is deserving of certiorari. Westours points out in its petition that when the district court enjoined the Park Service from implementing the 1996 Vessel Management Plan for the remainder of the season, "five cruise ships operated by petitioner which had been scheduled to call on Glacier Bay" had to sail elsewhere. Pet. 3. Next year, if the injunction is in place for the full cruise season, presumably about three times that number—fifteen Westours ships—will visit ports of call other than Glacier Bay. That hardly presents an "extremely important question" warranting Supreme Court intervention. Pet. 26. Westours also opines that, unless this Court grants certiorari, "a single party will be able to halt fishing and logging management, road construction, and a host of other activities authorized by the government, by filing a NEPA action and seeking an injunction." Pet. 15. That is exactly why NEPA was enacted; it ensures that the government reckons with the consequences of its major proposals before acting on them, and enables interested parties to compel the government to engage in the NEPA process if it fails to do so on its own. Westours' complaint that "a single party" should not be able to stop ongoing violations of the environmental laws should be taken up with Congress, not this Court.

Finally, Westours suggests that litigants are confused about the procedures for seeking and defending against injunctive relief in NEPA cases. Westours' last-ditch suggestion that this case presents an appropriate vehicle to "establish[] the proper standards and procedure for injunctions in NEPA cases" is ill-founded. Pet. 28. The procedures for obtaining injunctive relief are and have been plain.[9] The Ninth Cir-

[9] Petitioner suggests that NPCA was required to *demonstrate* irreparable environmental harm from the activities it sought to

cuit's ruling was adverse to Westours. That does not make its procedure suspect.

IV. THE DECISION BELOW WAS CORRECT

Finally, the Ninth Circuit's decision was correct. The Park Service issued its Vessel Management Plan in the face of a host of unknowns about the harmful effects of the plan and without benefit of a full EIS. The court of appeals concluded that the Plan presented a sufficient likelihood of harm to endangered humpback whales, endangered sea lions, myriad other species in the Park, and the Park's air and water quality, to warrant an injunction. Pet. App. 26a-29a. It properly directed the district court to enter that injunction, having concluded that the scope of the injunction to which NPCA was entitled was "quite plain."[10] *Id.* 29a; *see also Citizen*

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enjoin. Pet. 24-25. That is incorrect, as the courts of appeal have recognized. To require a plaintiff to demonstrate that an agency action undertaken in violation of NEPA "*will* have particular environmental effects" would be to require a plaintiff to "conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (emphasis in original); *see Sierra Club* v. *Hodel*, 848 F.2d at 1097 (court applied traditional balancing test in NEPA case, found harm impossible to assess before NEPA studies completed, and granted injunction). As the *Coleman* court explained, "[c]ompliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS." 521 F.2d at 671.

[10] Westours argues in passing that the court of appeals should have remanded the case to the district court for a further hearing on injunctive relief. Pet. 27 & n.16. The court of appeals correctly concluded that there was no need. Pet. App. 29a. The Ninth Circuit fully considered and rejected petitioner's allegations of harm, (the government having made no such allegations on appeal), as well as the extra-record evidence petitioner submitted on appeal regarding the purported short-term increase in humpback whale numbers. *See* Pet. App. 28a-29a (concluding that Westours' "evidence fails to tilt the balance of harms in its favor").

Advocates for Responsible Expansion, Inc. v. *Dole*, 770 F.2d 423, 443 (5th Cir. 1985) (granting injunctive relief at appellate stage for NEPA violation, and citing cases). The decision of the court of appeals was an appropriate and proper response to the ongoing NEPA violation and the serious threat to the Park it presented.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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